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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SANTOS LOPEZ REYES, Defendant and Appellant.	E032045 (Super.Ct.No. FWV 017134) OPINION

APPEAL from the Superior Court of San Bernardino County. Paul M. Bryant, Jr., Judge. Affirmed.

Steven Schorr, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Bradley A. Weinreb and Warren P. Robinson, Deputy Attorneys General, for Plaintiff and Respondent.

1. Introduction

In December 1998, while defendant was serving a 70-year sentence for 11 counts of second degree robbery, he stabbed to death his cell mate, Miguel Lopez, inflicting 26 wounds. In December 1999, defendant attacked Deputy Ronald Browne, who was escorting defendant from the prison law library. A jury convicted defendant of murder,[1] two counts of custodial manufacture of a weapon,[2] assault likely to produce great bodily injury,[3] battery with serious bodily injury,[4] and related enhancements.[5] His prison sentence for the present crimes is an indeterminate term of 156 years to life.

On appeal, defendant contends the court abused its discretion by denying his motion not to wear a stun belt during trial and committed two errors when it instructed the jury with CALJIC No. 2.62 and did not instruct the jury sua sponte with CALJIC No. 5.17. We reject all three contentions and affirm the judgment.

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[1] Penal Code section 187, subdivision (a). All further statutory references are to the Penal Code.

[2] Section 4502, subdivision (b).

[3] Section 245, subdivision (a)(1).

[4] Section 243, subdivision (d).

[5] Sections 667, subdivision (a)(1) and 1170.12, subdivisions (a) through (d).

2. Stun Belt

The stun belt is a well-known courtroom security device. As described in *People v. Mar*:[6] "'Stun belts are used to guard against escape and to ensure courtroom safety. This device, manufactured by Stun-Tech, is known as the Remote Electronically Activated Control Technology (REACT) belt. The type of stun belt which is used while a prisoner is in the courtroom consists of a four-inch-wide elastic band, which is worn underneath the prisoner's clothing. This band wraps around the prisoner's waist and is secured by a Velcro fastener. The belt is powered by two 9-volt batteries connected to prongs which are attached to the wearer over the left kidney region. . . .

"'The stun belt will deliver an eight-second, 50,000-volt electric shock if activated by a remote transmitter which is controlled by an attending officer. The shock contains enough amperage to immobilize a person temporarily and cause muscular weakness for approximately 30 to 45 minutes. The wearer is generally knocked to the ground by the shock and shakes uncontrollably. Activation may also cause immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal. An electrical jolt of this magnitude causes temporary debilitating pain and may cause some wearers to suffer heartbeat irregularities or seizures. [Citations.]' [Fn. omitted.]"

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[6] *People v. Mar* (2002) 28 Cal.4th 1201, 1214-1215.

Mar recognized that use of a stun belt has potentially adverse affects for a defendant on trial: "Even when the jury is not aware that the defendant has been compelled to wear a stun belt, the presence of the stun belt may preoccupy the defendant's thoughts, make it more difficult for the defendant to focus his or her entire attention on the substance of the court proceedings, and affect his or her demeanor before the jury—especially while on the witness stand."[7] For those reasons, use of the belt must be justified for security purposes.[8]

In the present case, defendant's motion, focusing on his request not to be shackled, made only one reference to the stun belt: "The Defendant also requests that a 'Stun Belt' not be attached during court proceedings." In ruling, the court said, "As relates to being shackled, it is the Court's intent not to shackle him, but to in fact have a stun belt placed on him. Given his record and what the Court has read in those [preliminary hearing] transcripts, it appears to be appropriate that he be belted when he's in court, and it will be during the course of the trial."

Citing *Mar* and constitutional principles, defendant protests the court ordered him to wear a stun belt during trial without "a showing of manifest need for such restraints."[9] He argues that neither his criminal record or the circumstances of the present offenses can

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[7] *People v. Mar, supra,* 28 Cal.4th at page 1219.

[8] *People v. Mar, supra,* 28 Cal.4th at pages 1219-1220.

[9] *People v. Mar, supra,* 28 Cal.4th at pages 1204, 1217-1220.

supply the necessary justification.[10] He further asserts the error was prejudicial and not harmless beyond a reasonable doubt.

The California Supreme Court has discussed when a defendant may be restrained:

"We are not unmindful of the dangers posed by unruly defendants or by those who have expressed an intention to escape. . . . However, we cannot condone physical restraint of defendants simply because they are prisoners already incarcerated on other charges or convictions. [Fn. omitted.]

"We next consider whether shackling of the defendant in the case at bar was an abuse of discretion. No reasons for shackling the defendant appear on the record. There is no showing that defendant threatened to escape or behaved violently before coming to court or while in court. The fact that defendant was a state prison inmate who had been convicted of robbery and was charged with a violent crime did not, without more, justify the use of physical restraints. As our discussion heretofore indicates, the trial judge must make the decision to use physical restraints on a case-by-case basis. The court cannot adopt a general policy of imposing such restraints upon prison inmates charged with new offenses unless there is a showing of necessity on the record. The court's summary denial of the motion to release defendant from his shackles was not based upon such a showing of record and implies a general policy of shackling all inmate defendants

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[10] *People v. Duran* (1976) 16 Cal.3d 282, 293.

accused of violent crimes. We therefore conclude that it was an abuse of discretion to shackle defendant."[11]

Here little or no evidence showed defendant presented a security risk during the trial. Except for his history of generally violent and criminal behavior and his particular violence against a law enforcement officer, there is no indication of any threatening conduct by him during the prosecution of this case. Apparently the trial court found justification for the stun belt but it did not articulate the reasons on the record: "'The showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record . . . . The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion.'"[12]

But, under the circumstances present in this case, even if it was an abuse of discretion for the court to order defendant to wear a stun belt, either the error was not prejudicial[13] or the error was harmless beyond a reasonable doubt.[14]

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[11] *People v. Duran, supra,* 16 Cal.3d at pages 292-293, cited in *People v. Mar, supra,* 28 Cal.4th at pages 1217-1218.

[12] *People v. Mar, supra,* 28 Cal.4th at page 1217, citing *People v. Duran, supra,* 16 Cal.3d at page 291.

[13] *People v. Mar, supra,* 28 Cal.4th at page 1225, citing *People v. Watson* (1956) 46 Cal.2d 818, 836-837.

[14] *People v. Mar, supra,* 28 Cal.4th at page 1225, footnote 7, citing *United States v. Durham* (11th Cir. 2002) 287 F.3d 1297, 1308.

First, as the People argue, defendant did not seem to have been discomfited by wearing the stun belt. He was not apparently overly conscious of it. He did not complain about it. He testified on his own behalf. Defendant's example of being concerned about whether he needed permission to use a pointer was not necessarily directly connected to wearing the stun belt. A criminal defendant might consider himself less free than other witnesses to pick up an object that might be employed as a weapon. But, by and large, there is no evidence defendant's demeanor while testifying was adversely affected by wearing the belt.[15]

Second, the evidence at trial, while in conflict, was not relatively close, as it was described in *Mar*. As to the murder and weapons charges, the prosecution's evidence established that in November 1998, a deputy found a cellophane-wrapped shank in defendant's cell. Although he subsequently disavowed his statements, Michael Weems, another inmate, told police he had given defendant a cellophane wrapper on the day Lopez was stabbed. In the evening, while being escorted to a shower, Weems witnessed defendant, holding a shank, squaring off with Lopez. Another inmate heard someone pleading "Give me a break, Homes."

Lopez was stabbed 26 times, six times in the back, four of those deeply. Even though a fourth inmate made contradictory statements about whether Lopez was

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[15] *People v. Mar, supra,* 28 Cal.4th at page 1225.

physically aggressive, the nature of Lopez's injuries belies defendant's claims that he acted in self-defense or Lopez himself may have inflicted the fatal wounds.

Defendant admitted to disposing of a knife or shank by flushing it down the toilet after Lopez collapsed. On the cell floor, the police investigation found grinding marks, consistent with an effort to sharpen a weapon.

Subsequently, in January 1999, a search discovered a metal shank that matched a missing piece of metal from the door in defendant's cell. Defendant was overheard to announce, "They found where I cut out that blade." Again, in March 1999, the deputies searched defendant's cell and found he had been trying to make a shank using screws from the cells' intercom.

As to the assault and battery charges, a jail librarian witnessed defendant make an unprovoked attack on Deputy Browne.

Defendant flatly denied making or possessing a shank. Regarding the murder charge, defendant claimed Lopez was mentally disturbed and physically aggressive. In the cell with defendant, Lopez yelled, argued with himself, and used profanity. He began punching himself with an object and then pursued defendant. Defendant tried to calm Lopez down by holding him in a bear hug and grabbing the object. Defendant may have stabbed Lopez inadvertently. Lopez stopped struggling and fell down. Defendant flushed the object down the toilet to keep it away from Lopez. Lopez revived for one last struggle before falling again. Defendant told the guards that Lopez had "started wigging

out" and gone after him. Finally, regarding the assault and battery, defendant claimed the deputy had threatened him and initiated the altercation.

When the stronger prosecution evidence is compared with the weaker defense evidence, we concur with the People's assertion that any abuse of discretion in compelling defendant to wear a stun belt was harmless error, regardless of the applicable standard of review.

3. CALJIC No. 2.62

Defendant contends the trial court erred by giving an instruction based on CALJIC No. 2.62, telling the jury it could draw an adverse inference against defendant if, while testifying, he failed to explain or deny any of the People's evidence. He asserts there is no instance where he failed to explain or deny any matter within his knowledge. Instead, he testified he did not know how to make a shank and he had not made one.

The People counter defendant did not explain or deny the shank-shaped piece missing from his metal cell door or the tampering with the intercom in his cell. Therefore, the instruction was proper and, if not, it was harmless.

CALJIC No. 2.62 itself contains the cure for any error because the final paragraph cautions: "If a defendant does not have the knowledge that he would need to deny or to explain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence."[16] The court also gave

[16] *People v. Ghent* (1987) 43 Cal.3d 739, 763.

the jury CALJIC No. 17.31, warning the jury all instructions do not apply and to disregard any instruction applying to a state of facts the jury determined did not exist. Giving CALJIC No. 17.31 in conjunction with CALJIC No. 2.62 rendered any error harmless.[17]

4. CALJIC No. 5.17

Defendant also asserts the trial court erred by not giving sua sponte CALJIC No. 5.17 concerning the lesser included offense of voluntary manslaughter, based on a theory of imperfect self-defense, the actual but unreasonable belief in the necessity to defend oneself. In particular, defendant reasons that the jurors could have decided that defendant genuinely believed he needed to kill Lopez in self-defense but the belief was unreasonable because defendant could have obtained help or disarmed Lopez by non-lethal means. The People contend the instruction was unjustified because the jury could not have found defendant had a genuine but unreasonable belief in the need to kill Lopez. According to the People, the jury had to choose between finding either defendant meant to murder Lopez or defendant acted reasonably in defending himself.

We disagree with the defense position. No evidence allowed the jury to conclude that defendant was capable of getting help or disarming Lopez non-lethally. Defendant testified that, throughout the incident, he repeatedly sought help by buzzing the intercom but there was no response. The officer on duty admitted not answering the intercom

[17] *People v. Saddler* (1979) 24 Cal.3d 671, 684.

because she was afraid and thought it was another cell's inmate calling. No help was forthcoming to defendant from that quarter. Nor, given defendant's testimony, could the jury have plausibly decided defendant could have disarmed Lopez. Instead, defendant described an intense life-or-death struggle in which Lopez could be subdued only by maximum force.

Because substantial evidence did not support it, the trial court's duty to give CALJIC No. 5.17 was not triggered.[18]

5. Disposition

We affirm the judgment.

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s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/Hollenhorst
J.

[18] *People v. Breverman* (1998) 19 Cal.4th 142, 157-158.